

No. 15088

United States
Court of Appeals
for the Ninth Circuit

BARBARA KARRELL,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN 10 1957

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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For the Appellant.

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Assistants U. S. Attorney,

600 Federal Bldg.,

Los Angeles, Calif.,

For the Appellee.

1. *On the Nature of the Human Species* (1859)

2. *On the Descent of Man* (1871)

3. *The Descent of Man* (1871)

4. *On the Descent of Man* (1871)

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16. *On the Descent of Man* (1871)

17. *On the Descent of Man* (1871)

In the United States District Court, Southern
District of California, Central Division

No. CR-20365

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BARBARA KARRELL,

Defendant.

AGREED STATEMENT UNDER RULE 76

It Is Hereby Agreed by and Between Barbara Karrell, Appellant, and the United States of America, Appellee, for the purposes of an agreed statement under Rule 76 of the Rules of Civil Procedure, that this statement and its exhibits shall constitute the entire record on appeal herein. It is stipulated that Exhibit "A" is a true copy of the Judgment appealed from, that Exhibit "B" is a true copy of the Findings of Fact and Conclusions of Law thereon, that Exhibit "C" is a true copy of the Notice of Appeal and that Exhibit "D" is a designation of the Points which will be briefed and argued by the Appellant.

It Is Further Agreed that no designation of record need be made under Rule 75(a) of the Rules exhibits shall by this reference become a portion of of Civil Procedure, and that each of the aforesaid

Barbara Karrell vs.

this agreed statement as though set forth herein at length.

.....,
ERNEST J. ZACK,
Attorney for Barbara Karrell.

.....,
Assistant United States At-
torney.

Order

The above statement conforms to the truth, will be sufficient to present the questions raised by this appeal, and is hereby approved and certified to the Court of Appeals as the record on appeal. Time for the docketing of this record in the Court of Appeals is hereby extended to and including April 9, 1956.

Dated: April 3, 1956.

WM. C. MATHES,
Judge.

EXHIBIT A

[Title of District Court and Cause.]

ORDER

The parties having stipulated that the above motion be heard this date at San Francisco, and the motion having been heard and submitted for deci-

sion, it is now ordered that the motion is hereby denied this 24th day of January, 1956.

24th day of January, 1956.

WILLIAM C. MATHES,
United States District Judge.

Filed January 24, 1956, at 4:47 p.m.

EXHIBIT B

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preamble

This Court on January 24, 1956, entered its order denying a motion of defendant Barbara Karrell to set aside the judgment of conviction herein under Section 2255, Title 28, U.S.C.A. The Court hereby makes its Findings of Fact and Conclusions of Law as to the matters heard and determined upon said motion.

Findings of Fact

I.

That Barbara Karrell was convicted under six counts of an indictment dated October 27, 1948, in United States of America vs. Barbara Karrell, No.

CR-20365. That trial of said action was on January 12th, 13th, 14th, 18th and 19th, 1949, in this Court before the undersigned, and judgment on such conviction was entered on February 25, 1949.

II.

That all of the offenses involved were misdemeanors. That Barbara Karrell was sentenced to one year on each of the six counts and to pay a \$1,000.00 fine on each of same. That such one-year periods were to run concurrently. That all of such sentence was suspended and Barbara Karrell was placed on probation for a period of five years under the usual conditions, and under the further condition that Barbara Karrell make restitution to veterans as shown by the judgment of the Court dated February 16, 1951. That each of said counts under which Barbara Karrell was convicted were alleged offenses against the United States under Section 697 and 715 of Title 38, U.S.C.A. That the language of all of said counts were the same with the exception of the names, dates of events and description of property and amounts involved.

III.

That said judgment of conviction was appealed to the Court of Appeals for the Ninth Circuit and affirmed in 181 F. 2d 981, with modification of the judgment in respects not material to the making or decision of the within motion. That a Petition for Certiorari in the United States Supreme Court was denied and the Mandate of the Court of Appeals

was spread on the record of this Court on January 24, 1951.

IV.

That Barbara Karrell has not been convicted of any other criminal offense, State or Federal, except the within offenses. That while she failed to pay the fine and make restitution theretofore ordered by the Court, it appeared to the Court that said failure was not wilful or intentional.

V.

That by virtue of the judgment of probation for five years, defendant Barbara Karrell was in custody of the United States Probation Officer for the Southern District of California and subject to the order of this Court. That Barbara Karrell was in custody at the time of the hearing of this order and at the time of the denial thereof.

VI.

That as a result of, and after the within conviction, defendant Karrell lost her California Real Estate License which was revoked by the California Real Estate Commissioner. That the decision of the California Real Estate Commissioner was affirmed in Karrell v. Watson, Real Estate Commissioner, 116 C. A. 2d 269, 254, P. 2d 653 (1953).

VII.

That defendant Karrell was unable to bring a proceeding under Section 2255 prior to January 24, 1956, because of lack of funds. That her delay in

bringing such motion was caused by financial reasons.

Conclusions of Law

I.

On January 24, 1956, defendant Barbara Karrell was in the custody of the United States Probation Officer for the Southern District of California, within the meaning of Section 2255, Title 28, U.S.C.A.

II.

That defendant Barbara Karrell could not have been convicted of any other Federal offense or offenses under the facts alleged in the various counts in the indictment.

III.

That the motion by defendant Barbara Karrell to set aside her conviction is based upon her assertion that the Court did not have jurisdiction to try the offenses alleged in the indictment, or to impose judgment of confinement thereon, for the reason that Sections 697 and 715 of Title 38, U.S.C.A., as set forth in the indictment do not allege a Federal offense.

IV.

Whatever view this Court might entertain as a matter of first impression, the matter of the sufficiency of the facts alleged in the indictment to state an offense under the laws of the United States was before the Court of Appeals and this Court

is bound by its decision thereon in Karrell vs. United States, 181 F. 2d 981.

Dated: March 22, 1956.

WILLIAM C. MATHES,
Judge.

Approved as to form:

THOMAS LUDLOW,
Assistant United States At-
torney.

EXHIBIT C

[Title of District Court and Cause.]

NOTICE OF APPEAL

Barbara Karrell,

(Appellant)

9973 Durant Drive,

Beverly Hills, California.

Ernest J. Zack, Esq.,

(Appellant's Attorney)

621 South Spring Street,

Los Angeles 14, California.

Offense: Six counts of violation of Sections 697 and 715 of Title 38 U.S.C.A.

On January 24, 1956, defendant, Barbara Karrell, made a motion to vacate the judgment of conviction herein under the provisions of Section 2255

of Title 28 United States Code. Such motion was heard before the Honorable William C. Mathes and an order made denying same on that date.

Appellant, Barbara Karrell, is now on probation granted by the court under the terms of the original judgment of conviction made and entered on February 25, 1949.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: January 24, 1956.

/s/ BARBARA KARRELL.

/s/ ERNEST J. ZACK,

Attorney for Barbara Karrell.

Filed January 24, 1956, as of 4:48 p.m.

EXHIBIT D

[Title of District Court and Cause.]

STATEMENT OF APPELLANT'S POINTS

I.

The District Court Had No Jurisdiction to Render the Judgment of Conviction

- A. Federal Courts Have No Common Law Criminal Jurisdiction.
- B. Federal Statutes Define Crimes Are to Be Strictly Construed.

C. The Acts Charged in the Indictment Do Not Constitute Allegations of Violations of the Laws of the United States.

D. The Decisional Law Analyzing the Effect of Sections 697 and 715, Title 38, U.S.C.A., Has Not Determined the Point Raised by This Motion.

II.

The District Court Had Power to Vacate the Judgment of Conviction

A. The Relation Between Section 2255, Title 28, U.S.C.A., and Habeas Corpus.

B. Res Judicata Does Not Apply to Proceedings Under Section 2255, Title 38, U.S.C.A.

C. The Doctrine of the "Law of the Case" Does Not Apply.

D. Miss Karrell was "In Custody" Within the Meaning of Section 2255.

E. Miss Karrell's Right to Have the Conviction Vacated Has Not Been Barred by the Lapse of Time.

III.

The Matter Is Not Moot

IV.

The Court of Appeals Has Jurisdiction to Review a Judgment by the District Court Denying a Motion Under Section 2255, Title 28, U.S.C.A., to Set Aside a Judgment of Conviction.

[Endorsed]: Filed April 3, 1956.

[Endorsed]: No. 15088. United States Court of Appeals for the Ninth Circuit. Barbara Karrell, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 5, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15088

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER

Upon Motion to Dismiss Appeal as Moot

Before Stephens, Pope and Fee, Circuit Judges.

The motion of the appellee to dismiss the appeal as moot is denied without prejudice to the right of the appellee to renew the motion at the time of the hearing of the case upon the merits. If the motion is renewed, counsel are invited to discuss the question whether the motion in the District Court, purportedly filed pursuant to § 2255 of Title 28, U.S.C.A., may, upon such appeal or for the purposes of such a motion, be considered to be a proceeding in the nature of coram nobis within the meaning of the decision in *United States v. Morgan*, 346 U.S. 502.

Judge Stephens took no part in the consideration of the motion or the making of this order.

/s/ **WALTER L. POPE,**

/s/ **JAMES ALGER FEE,**

United States Circuit Judges.

[Endorsed]: Filed November 27, 1956.

